

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

11 DEVANTE B. HARRIS,
12 Plaintiff,
13 vs.
14 M. DOCANTO,
15 Defendant.

1:20-cv-00042-DAD-GSA-PC

**FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS CASE BE
DISMISSED, WITH PREJUDICE, FOR
FAILURE TO STATE A CLAIM
(ECF No. 16.)**

**OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN DAYS**

I. BACKGROUND

Devante B. Harris (“Plaintiff”) is a state prisoner proceeding *pro se* with this civil rights action pursuant to 42 U.S.C. § 1983. On January 8, 2020, Plaintiff filed the Complaint commencing this action. (ECF No. 1.) On March 24, 2021, the court dismissed the Complaint for failure to state a claim, with leave to amend. (ECF No. 15.) On April 30, 2021, Plaintiff filed the First Amended Complaint, which is now before the court for screening. 28 U.S.C. § 1915. (ECF No. 16.)

1 **II. SCREENING REQUIREMENT**

2 The court is required to screen complaints brought by prisoners seeking relief against a
 3 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
 4 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
 5 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek
 6 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).
 7 “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall
 8 dismiss the case at any time if the court determines that the action or appeal fails to state a claim
 9 upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

10 A complaint is required to contain “a short and plain statement of the claim showing that
 11 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
 12 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
 13 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
 14 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are taken
 15 as true, courts “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart Stores,
 16 Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). To state
 17 a viable claim, Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim
 18 to relief that is plausible on its face.’” Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service,
 19 572 F.3d 962, 969 (9th Cir. 2009). While factual allegations are accepted as true, legal
 20 conclusions are not. Id. The mere possibility of misconduct falls short of meeting this
 21 plausibility standard. Id.

22 **III. SUMMARY OF FIRST AMENDED COMPLAINT**

23 Plaintiff is presently incarcerated at Corcoran State Prison (CSP-Corcoran) in Corcoran,
 24 California, in the custody of the California Department of Corrections and Rehabilitation
 25 (CDCR), where the events at issue in the First Amended Complaint allegedly took place.
 26 Plaintiff names as sole defendant Correctional Officer (C/O) M. DoCanto (“Defendant”), who is
 27 being sued in his individual capacity.

28 Plaintiff’s allegations follow:

1 On December 4, 2015, Plaintiff was assigned to the Security Housing Unit (Segregation)
2 and housed in Facility 4B, Building 2L, cell 48. Defendant C/O DoCanto was assigned to this
3 same housing unit, where he worked as a floor officer on second watch.

4 On November 12, 2015, Defendant DoCanto used excessive force against Plaintiff. On
5 December 2, 2015, Plaintiff filed an administrative appeal addressing the excessive force
6 incident, CSPC-6-15-07851.

7 On December 4, 2015, CSP-Corcoran staff transported Plaintiff to Kings County Superior
8 Court. Upon information and belief, Defendant DoCanto went into Plaintiff's cell while Plaintiff
9 was gone. DoCanto was escorting the nurse during afternoon medication delivery. Upon
10 information and belief, and in retaliation for Plaintiff's excessive force complaint, Defendant
11 DoCanto planted sharpened metal in Plaintiff's cell. DoCanto then "found" the sharpened metal
12 he planted and attributed it to Plaintiff's possession. (Amended Complaint, ECF No. 16 at 8 ¶
13 12.) DoCanto then authored a false Rules Violation Report against Plaintiff, accusing him of
14 possessing dangerous contraband. DoCanto proclaims to have disposed of this dangerous
15 contraband.

16 Lieutenant Brodie [not a defendant] held a disciplinary hearing on this charge, found
17 Plaintiff not guilty, and dismissed the charge. Plaintiff pursued exhaustion of his administrative
18 remedies until January 5, 2016. Therefore, the statute of limitations was tolled until then.
19 Plaintiff is serving a life sentence with the possibility of parole and therefore, his statute of
20 limitations is tolled for two more years. Plaintiff submitted his original Complaint to prison
21 officials to be mailed to the court on January 1, 2020. Pursuant to the mailbox rule, that is the
22 day it is considered filed.

23 As relief, Plaintiff requests monetary damages including punitive damages.

24 **IV. PLAINTIFF'S RETALIATION CLAIM**

25 The Civil Rights Act under which this action was filed provides:

26 Every person who, under color of any statute, ordinance, regulation, custom, or
27 usage, of any State or Territory or the District of Columbia, subjects, or causes to
28 be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

1 secured by the Constitution and laws, shall be liable to the party injured in an
2 action at law, suit in equity, or other proper proceeding for redress . . .

3 42 U.S.C. § 1983.

4 [Section] 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a method
5 for vindicating federal rights elsewhere conferred.’” Graham v. Connor, 490 U.S. 386, 393-94
6 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)); see also Chapman v. Houston
7 Welfare Rights Org., 441 U.S. 600, 618 (1979); Hall v. City of Los Angeles, 697 F.3d 1059,
8 1068 (9th Cir. 2012); Crowley v. Nevada, 678 F.3d 730, 734 (9th Cir. 2012); Anderson v.
9 Warner, 451 F.3d 1063, 1067 (9th Cir. 2006). “To the extent that the violation of a state law
10 amounts to the deprivation of a state-created interest that reaches beyond that guaranteed by the
11 federal Constitution, Section 1983 offers no redress.” Id.

12 To state a claim under § 1983, a plaintiff must allege that (1) the defendant acted under
13 color of state law and (2) the defendant deprived him or her of rights secured by the Constitution
14 or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006); see also
15 Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing “under color of
16 state law”). A person deprives another of a constitutional right, “within the meaning of § 1983,
17 ‘if he does an affirmative act, participates in another’s affirmative act, or omits to perform an act
18 which he is legally required to do that causes the deprivation of which complaint is made.’”
19 Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting
20 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). “The requisite causal connection may be
21 established when an official sets in motion a ‘series of acts by others which the actor knows or
22 reasonably should know would cause others to inflict’ constitutional harms.” Preschooler II, 479
23 F.3d at 1183 (quoting Johnson, 588 F.2d at 743). This standard of causation “closely resembles
24 the standard ‘foreseeability’ formulation of proximate cause.” Arnold v. Int’l Bus. Mach. Corp.,
25 637 F.2d 1350, 1355 (9th Cir. 1981); see also Harper v. City of Los Angeles, 533 F.3d 1010,
26 1026 (9th Cir. 2008).

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1 **Retaliation – First Amendment Claim**

2 “Prisoners have a First Amendment right to file grievances [and lawsuits] against prison
 3 officials and to be free from retaliation for doing so.” Watison v. Carter, 668 F.3d 1108, 1114
 4 (9th Cir. 2012) (citing Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009)).

5 “Within the prison context, a viable claim of First Amendment retaliation entails five
 6 basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2)
 7 because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s
 8 exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate
 9 correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005). To state a
 10 cognizable retaliation claim, Plaintiff must establish a nexus between the retaliatory acts against
 11 him and his protected activity. Grenning v. Klemme, 34 F.Supp.3d 1144, 1153 (E.D. Wash.
 12 2014). A plaintiff can allege retaliatory intent with a timeline of events from which retaliation
 13 can be inferred. See Watison, 668 F.3d at 114. Because direct evidence of retaliatory intent
 14 rarely can be pleaded in a complaint, allegation of a chronology of events from which retaliation
 15 can be inferred is sufficient to survive dismissal. See Pratt v. Rowland, 65 F.3d 802, 808 (9th
 16 Cir. 1995) (“timing can properly be considered as circumstantial evidence of retaliatory intent”);
 17 Murphy v. Lane, 833 F.2d 106, 108–09 (7th Cir. 1987).

18 Plaintiff’s allegation that on December 2, 2015, he filed an administrative appeal against
 19 Defendant DoCanto for using excessive force on November 12, 2015 is sufficient to show that
 20 Plaintiff participated in protected conduct. The filing of an inmate grievance is protected
 21 conduct. Rhodes, 408 F.3d at 568.

22 Plaintiff describes adverse actions -- planting contraband in Plaintiff’s cell and then
 23 writing a false RVR accusing Plaintiff of possessing the contraband -- actions he believes were
 24 taken against him by Defendant DoCanto. However, Plaintiff fails to allege facts supporting his
 25 belief that Defendant DoCanto planted sharpened metal in Plaintiff’s cell in retaliation for
 26 Plaintiff’s prison appeal against DoCanto.

27 After the Supreme Court’s decisions in Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937,
 28 173 L. Ed. 2d 868 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955,

1 167 L. Ed. 2d 929 (2007), [a plaintiff's] factual allegations [in the complaint] “must . . . suggest
 2 that the claim has at least a plausible chance of success.” Dat Thanh Luong v. Alameda Cty.,
 3 No. 17-cv-06675-EMC, 2018 U.S. Dist. LEXIS 73713 (N.D. Cal. May 1, 2018) (internal
 4 quotation marks and citations omitted). In other words, [the] complaint “must allege ‘factual
 5 content that allows the court to draw the reasonable inference that the defendant is liable for the
 6 misconduct alleged.’” Id. (internal quotation marks omitted) (quoting Iqbal, 556 U.S. at 678.)

7 The Ninth Circuit has settled on a two-step process for evaluating pleadings: First, to be
 8 entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply
 9 recite the elements of a cause of action but must contain sufficient allegations of underlying facts
 10 to give fair notice and to enable the opposing party to defend itself effectively. Id. Second, the
 11 factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that
 12 it is not unfair to require the opposing party to be subjected to the expense of discovery and
 13 continued litigation. Id. (citing Levitt v. Yelp! Inc., 765 F.3d 1123, 1134-35 (9th Cir.
 14 2014)). Notably, “[t]he plausibility standard is not akin to a ‘probability requirement,’ but it asks
 15 for more than a sheer possibility that a defendant has acted unlawfully.” Id. (quoting Iqbal, 556
 16 U.S. at 678.)

17 The Ninth Circuit has held that the Iqbal/Twombly plausibility standard does not prevent
 18 a plaintiff from pleading facts alleged upon *information and belief*. Id. But while facts may be
 19 alleged upon *information and belief*, that does not mean that conclusory allegations are
 20 permitted. Id. A conclusory allegation based on *information and belief* remains insufficient
 21 under Iqbal/Twombly. Id. An allegation made on information and belief must still be “based on
 22 factual information that makes the inference of culpability plausible,” although a court may take
 23 into account whether “facts are peculiarly within the possession and control of the defendant.”
 24 Id. (internal quotation marks omitted) (quoting Menzel v. Scholastic, Inc., No. 17-cv-05499-
 25 EMC, 2018 U.S. Dist. LEXIS 44833, at *5 (N.D. Cal. Mar. 19, 2018)).

26 Here, Plaintiff’s allegations that Defendant DoCanto acted against him out of retaliation
 27 are conclusory and fail to reach a level of plausibility. Plaintiff states that “[u]pon information
 28 and belief, DoCanto went into Harris’s cell while he was gone; DoCanto was escorting the nurse

1 during afternoon delivery,” and “[u]pon information and belief, and in retaliation for Harris’s
2 excessive force complaint, DoCanto planted sharpened metal in his cell.” (ECF No. 16 at 7-8 ¶¶
3 10, 11.) Importantly, Plaintiff does not explain what facts lead him to believe that DoCanto was
4 escorting the nurse on the 4th for afternoon medication delivery when Plaintiff was out to court
5 on that day; nor what facts lead him to believe that medication delivery was made that day; nor
6 explains how DoCanto could plant contraband in his cell while being accompanied by the nurse
7 without the nurse observing DoCanto’s actions; nor how DoCanto learned of Plaintiff’s appeal
8 on December 4th when it was filed only two days prior. As to all of this Plaintiff then speculates,
9 without any supporting facts, that Defendant DoCanto planted a sharpened metal in Plaintiff’s
10 cell, “found” it later, and wrote a false RVR accusing Plaintiff of possession of contraband.

11 Thus, based on the foregoing, the court finds that Plaintiff fails to state a cognizable claim
12 against Defendant DoCanto for retaliation as his claim is based almost in whole on wild
13 speculation.

14 **V. CONCLUSION AND ORDER**

15 For the reasons set forth above, the court finds that Plaintiff fails to state any cognizable
16 claims in the First Amended Complaint. The court previously granted Plaintiff leave to amend
17 the complaint, with ample guidance by the court. Plaintiff has now filed two complaints without
18 stating any claims upon which relief may be granted under § 1983. The court is persuaded that
19 Plaintiff is unable to allege any facts, based upon the circumstances he challenges, that would
20 state a cognizable claim under section 1983. “A district court may deny leave to amend when
21 amendment would be futile.” Hartmann v. CDCR, 707 F.3d 1114, 1130 (9th Cir. 2013). The
22 court finds that the deficiencies outlined above are not capable of being cured by amendment,
23 and therefore further leave to amend should not be granted. 28 U.S.C. § 1915(e)(2)(B)(ii); Lopez
24 v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000).

25 Therefore, **IT IS HEREBY RECOMMENDED** that pursuant to 28 U.S.C. § 1915A and
26 28 U.S.C. § 1915(e):

27 1. This action be dismissed with prejudice for failure to state a claim upon which
28 relief may be granted under § 1983; and

2. The Clerk be directed to close this case.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen days** after the date of service of these Findings and Recommendations, Plaintiff may file written objections with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file objections within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: **October 26, 2021**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE